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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-598

E. P. SHANNON, ET AL.,
Petitioners,

vs.

GENOVEVA MORALES, ET AL.,
Respondents

Brief for Respondents in Opposition

VILMA S. MARTINEZ
SANFORD JAY ROSEN
RICARDO DE ANDA
Mexican American Legal Defense and Educational Fund
145 Ninth Street
San Francisco, California 94103
Telephone: (415) 864-6000

GEORGE KORBEL
Mexican American Legal Defense and Educational Fund
501 Petroleum Commerce Bldg.
201 N. St. Mary's Street
San Antonio, Texas 78205
Telephone: (512) 224-5476

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IN THE
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No. 75-598

E.P. SHANNON, et al.,
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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

. Do the Constitution and laws of
he United States prohibit public school
fficials from intentionally segregating
exican American students?

. May a federal court order the dis-
antling of a non-statutory dual school
ystem where the evidence of intentional
egregation is overwhelming?

3. Is it error for a federal court on appeal to take judicial notice of public records compiled by a federal administrative agency concerning the same issues of fact and law as the case-in-chief?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

Respondent, who was plaintiff below, is a Mexican American resident of the Uvalde, Texas Independent School District,[1] and a parent of students attending schools operated by the School District. Petitioners, who were defendants below, are members of the Board of Trustees of the School District, the Superintendent of Schools, and a former principal of one of the elementary schools. Plaintiff, as a representative of the class of Mexican American parents and students of the School District, sought injunctive and declaratory relief prohibiting the defendants' unlawful segregation of Mexican American students and denial of equal educational opportunities to these students because of their ethnic origin in violation of the Fourteenth Amendment's

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1. Hereinafter "School District".

right to equal protection of the laws, and in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Plaintiff seeks, on behalf of her class, to dismantle the defendants' long-standing unlawful dual school system.

The School District consists of one primary school, four elementary schools, one junior high school and one high school.[2] At trial, plaintiff presented evidence showing that Uvalde school officials had by design and intent segregated Mexican American students. Plaintiff also introduced evidence that the school district was not meeting the educational needs of students with English-language deficiencies, and that there was a significant lack of Mexican American and Spanish-speaking teachers and staff in the school system. Finally, plaintiff showed that Mexican American students were discriminatorily placed in remedial classes at the junior

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2. An additional elementary school in the School District is located in Batesville, roughly 20 miles south of Uvalde.

high and senior high levels. The District Court for the Western District of Texas held that despite the evidence raised by plaintiff, including the existence of racially identifiable Mexican American schools, the defendants were not guilty of unlawful, i.e., intentional ethnic segregation or discrimination. Morales v. Shannon, 366 F. Supp. 813, 818 (W.D. Tex. 1973) (See, Petitioners' Appendix, pp. A-12, A-17). The court subsequently denied all relief to plaintiff and her class. 366 F. Supp. at 833 (Petitioners' Appendix, p. A-49).

Plaintiff appealed, arguing that the evidence at trial clearly and exhaustively showed segregatory intent on the part of Uvalde school officials, and that the District Court erred in not making this finding. The Court of Appeals agreed, and on July 23, 1975, held that the evidence adduced at trial was overwhelming proof of an intent by Uvalde school officials to segregate Mexican American students, reversed the District Court's decision as "clearly erroneous",

and remanded with instructions for the implementation of a remedy to end the unlawful separation of Mexican American and Anglo students in the school district.[3] Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975) (Petitioners' Appendix, p. A-1). On November 7, 1975, defendants submitted a school desegregation plan to the District Court pursuant to the Court of Appeals' remand. Plaintiff has no substantial objection to the plan at this time.

II. STATEMENT OF THE FACTS.

Uvalde is a small community of approximately 24,000 people, situated in South Texas in close proximity to the

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3. The Court of Appeals also remanded for further evidence on the issues of bilingual education and discrimination in the selection and assignment of Mexican American teachers and staff. It affirmed the District Court on the issue of discrimination of Mexican Americans through the use of "ability groupings". 516 F.2d at 415.

Mexican border. South Texas is somewhat unusual in that Mexican Americans have historically, and to this day, comprised a majority of the population. Uvalde is no different, and this is reflected in the fact that almost two-thirds of the students in the School District are of Mexican American descent. The School District was founded in 1907 with a policy of separating the Mexican and Anglo races. (T.Tr. p. 348) Accordingly, a separate Mexican school was constructed for the sole use of all the Mexican American students in the District. (T.Tr. p. 348) To this day, the great majority of Mexican American elementary students are assigned to schools over 95% Mexican American in composition. Morales v. Shannon, 516 F.2d 411, 412 (5th Cir. 1975).

The city of Uvalde is characterized by a rigid residential separation of its Mexican American and Anglo residents, with almost all of the Mexican Americans living in the central, southern and southwestern portions of the town, and the

Anglos living in the north and northeast portions. Morales v. Shannon, 366 F. Supp. 813-18 (W.D. Tex. 1973). Uvalde school officials have purposefully exploited these residential patterns to promote a dual elementary school system by use of school construction sites. 516 F.2d at 413. For example, in 1954 the Robb School was constructed in a Mexican American neighborhood and the Dalton school in the Anglo section. 516 F.2d at 413. In 1966, Uvalde school officials replaced one of the original Mexican elementary schools (West Garden) with the construction of a new Mexican school (Anthon) in the Mexican American neighborhood. 516 F.2d at 413. The perpetuation of a dual school system in Uvalde was officially established in 1966 when Uvalde school officials initiated a school assignment policy which ". . . froze the Mexican American students into the Robb and Anthon schools." 516 F.2d at 413. These actions by school officials were held to be ". . . strong evidence of segregatory intent." 516 F.2d at 413.

The Uvalde school system also serves students residing in rural areas proximate to the city of Uvalde. Students from these rural areas are transported by the School District to schools in the city. These students are granted freedom of choice in school assignment, despite the fact that students residing in Uvalde itself are assigned to their respective neighborhood schools. As a result, virtually all rural Anglo students have chosen to attend the Anglo school. This additional fact persuaded the Court of Appeals to declare the evidence of intentional segregation by defendants to be "overwhelming". 516 F.2d at 413.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS USED THE CORRECT LEGAL STANDARD IN HOLDING THAT DEFENDANTS INTENTIONALLY SEGREGATED MEXICAN AMERICAN STUDENTS.

The Court of Appeals held that the record before it demonstrated clear proof of intent to segregate Mexican American students by Uvalde school officials. Morales v. Shannon, 516 F.2d 411, 413 (5th Cir. 1975). The court thus found the School District to be in violation of the Constitution and remanded to the trial court for the implementation of a remedy to dismantle the illegal school system in Uvalde. 516 F.2d at 411. This finding of a constitutional violation is clearly correct, and does not require review.

Defendants cite this Court's opinion in Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), for the argument that the Court of Appeals used an incorrect legal standard in finding a constitutional

violation. However, the Court of Appeals was faithfully following Keyes in its decision. Keyes does not require any more than intentional segregation in finding illegal state action for purposes of a desegregation remedy, regardless of whether a school district operated in the past pursuant to a statutory dual system. 413 U.S. at 201. In Keyes, the District Court found that Denver school officials intentionally segregated black students in the Park Hill section of the school district. 413 U.S. at 199. This Court affirmed the finding of purposeful segregation as to the Park Hill schools, and held that state action amounting to intentional segregation was prohibited by the Constitution. 413 U.S. at 200.

The law is now well settled. Intentionally segregatory acts and omissions by school officials which result in a dual school system are proscribed by the Constitution and federal statutes, and school officials are responsible for affirmatively dismantling such a system. Keyes, supra, 413 U.S.

at 189.[4/] At best, then, petitioners' request for a Writ of Certiorari is reduced to a plea for this Court to review and reweigh the evidence.

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4. It should be pointed out that this Court in Keyes specifically held that Mexican American students (Hispanos) constitute an identifiable minority group protected as such by the Fourteenth Amendment, and that this status places a constitutional ban on the intentional creation of racially identifiable Mexican American schools. Keyes v. School District No. 1, Denver, 413 U.S. at 197.

II. THE COURT OF APPEALS UTILIZED PROPER AND RELIABLE EVIDENCE IN FINDING INTENTIONAL SEGREGATION AND THIS FINDING IS AMPLY SUPPORTED BY THE RECORD.

In remanding the case to the District Court for remedial relief, the Court of Appeals made a specific finding that Uvalde school officials acted with the purpose and intent of segregating Mexican American students. Morales v. Shannon, 516 F.2d 411, 413. This holding of purposeful segregation was arrived at after consideration by the court of a voluminous record, including the trial transcript and documents from administrative hearings before the Department of Health, Education and Welfare.[5/]

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5. The School District has been subjected to federal fund termination proceedings by HEW for its failute to comply with the provisions of Title VI of the Civil Rights Act of 1964. A hearing was held on this matter in November of 1972, and an appeal was taken to the HEW Reviewing Authority. This has resulted in a finding of violations of the Civil Rights Act of 1964. Both adjudicatory levels of HEW have found defendants guilty

(continued next page)

A close analysis of the Court of Appeals' decision in this case reveals that the "clearly erroneous" standard by which the Fifth Circuit reversed the District Court's finding of non-purposeful segregation is addressed to the lower court's application of the law rather than its findings of fact. The District Court noted the historical separation of the races, the school site selections which could only result in separate schools, the use of boundary zones to assure segregation and the permitting of Anglo rural students to flock to a separate school. Morales v. Shannon, 366 F. Supp. 813, 817-18 (W.D. Tex. 1973).

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5. (continued) of intentionally segregating Mexican American students. In the Matter of Board of Education of the Uvalde Independent School District, Administrative Proceeding, Department of Health, Education and Welfare, Docket No. S-47 (July 24, 1974). An order terminating federal funds as a result of the School District's violation of federal anti-discrimination laws is currently awaiting final discretionary appeal by the Secretary of HEW. See, Morales v. Shannon, 516 F.2d 411, 415 (5th Cir. 1975), where the court refers to these proceedings.

Indeed, this case is not unlike most Mexican American school desegregation cases in Texas, where "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." Neil v. Biggers, 400 U.S. 188, 189 (1972). See, e.g., Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. 1972) (en banc); United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972); Arvizu v. Waco Independent School District, 343 F. Supp. 1264 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974); Tasby v. Estes, 517 F.2d 92 (5th Cir. 1975); United States v. Midland Independent School District, __F.2d__(5th Cir. August 28, 1975) (No. 71-3271); United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 818 (5th Cir. 1972); Zamora v. New Braunfels Independent School District, __F.2d __ (5th Cir. September 5, 1975) (No. 73-2999).

The district court held that the acts and omissions of Uvalde school officials, including the actual separation of the races in the elementary schools, were neutral in quality, and did not amount to intentional segregation. 366 F. Supp. at 818. However, in light of well-settled precedents in Mexican American school desegregation lawsuits in Texas, the Court of Appeals overruled, stating that the evidence of intentional segregation was overwhelming. 516 F.2d at 413. The circuit courts are not in disagreement. Where the evidence heavily favors a finding of intentional segregation, a violation of the Constitution has occurred and a school district is required to take affirmative action to dismantle a dual school system. Morgan v. Kerrigan, 509 F.2d 580, 592 (1st Cir. 1974); Keyes v. School District No. 1, Denver, __F.2d__ (10th Cir. September 16, 1975); Soria v. Oxnard School District Board of Trustees, 488 F.2d 579, 585 (9th Cir. 1973); Davis v. School District of the City of Pontiac, Inc., 443 F.2d 573, 575-76 (6th

Cir. 1971); United States v. Board of School Commissioners of City of Indianapolis, 474 F.2d 81, 85-89 (7th Cir. 1973); Hart v. Community School Board of Education, New York School District No. 21, 512 F.2d 37, 51 (2nd Cir. 1975).

Defendants wish to severely limit judicial analysis in defining unconstitutional action by school officials. Defendants would deny the courts the use of inferences, and even sound judicial judgment, in protecting the people from illegal action by state officials. Defendants' position would leave the courts powerless, even in cases where the evidence of illegal state action was "overwhelming". This position is in direct contradiction to this Court's holding in Keyes, affirming the findings by the lower court of intentional segregation by Denver school officials in the Park Hill schools. Keyes v. School District, 413 U.S. 189, 200 (1973).

This Court has never placed such evidentiary burdens on plaintiffs in school desegregation cases. In Swann

v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971), reh. denied, 403 U.S. 912 (1971), the Court held that a neighborhood school assignment policy could be found to be unconstitutional despite its outward "neutrality" towards racial separation. Moreover, this Court in Keyes, supra, 413 U.S. 189, upheld the determination by the District Court and the Tenth Circuit that Denver school officials had intentionally segregated the schools in a substantial portion of the school district. 413 U.S. at 200. See also, Keyes v. School District, 303 F. Supp. 279, 282-86 (D. Colo. 1969). The lower court in Keyes based its finding on evidence remarkably similar to that presented in the instant case. The evidence as to the Park Hill schools was that the Denver School Board had constructed schools and devised its zone boundaries to take advantage of residential patterns with "knowledge of the effect they would have on the racial composition of the schools." Keyes v. School District, 445 F.2d 990, 1001 (10th Cir. 1971).

The evidence in the instant case of intentional segregation is compelling, and the Fifth Circuit was correct in finding so. The court first considered the history in Uvalde of separating the Mexican and Anglo students. The trial record reflects that separate "Mexican" schoolhouses were constructed, furnished, maintained and annexed periodically. Moreover, the teachers for the Mexican schools were separately appointed and designated, and the Mexican students were discouraged from attending white schools. (Plaintiffs' Exhibits Nos. 1-A through 1-EE.) The Court of Appeals noted that since 1954 the School District has utilized school site selections to promote a dual school system. 516 F.2d at 413. In 1966 Uvalde school officials adopted a neighborhood school policy which set boundary lines and school zones. This neighborhood school policy utilized residential patterns and previous school site selection decisions to effectively segregate Mexican American students in the Uvalde elementary schools. 516 F.2d at 413. School officials further promoted this dual school system by granting

to virtually all rural Anglo students assignment to the Anglo school, while they maintained separate Mexican American schools through school zones and boundaries. 516 F.2d at 413. Given this "overwhelming" evidence, the intent to segregate Mexican American students is only too obvious. 516 F.2d at 413.

III. THE COURT OF APPEALS PROPERLY CONSIDERED PUBLIC DOCUMENTS BY THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE PURSUANT TO RULE 201 OF FEDERAL RULES OF EVIDENCE (Judicial Notice of Adjudicative Facts).

The Fifth Circuit in considering this appeal examined the set of documents which has constituted part of the record of an administrative hearing held by the Department of Health, Education and Welfare (HEW) in November 1972, approximately two weeks before the trial of this case. This hearing was an administrative compliance proceeding initiated by HEW against the Uvalde Independent School District, pursuant to the provisions of Section 602 of the Civil Rights Act of 1964 (Title VI) and applicable Federal Regulations. The purpose of this hearing was to determine whether the School District's federally funded education programs should be terminated because of an alleged failure to comply with the provisions of the Fourteenth Amendment and Title VI, by virtue of its allegedly

discriminatory policies and practices in the operation of its public schools. Also examined by the Court of Appeals was a copy of the decision and order of the administrative law judge in the above-described HEW hearing, finding the District's elementary schools to be unlawfully segregated, and ordering the corresponding termination of federally funded programs in these schools.

The "transcript" material of the HEW hearings consisted mainly of statistical documents and was introduced as evidence at trial (T.Tr. p. 2-6, 428). Both trial counsel and the lower court were fully aware and consented to counsel's introduction of the documents in question. These documents are public records in the form of formal pleadings before a federal administrative agency, which are directly addressed to every major issue faced by the District Court and the Court of Appeals (T.Tr. p. 4). These materials, and the decision by the HEW administrative law judge, were submitted to the Court of Appeals along with

the records in the lower court. Defendants moved to strike these materials, but the Court of Appeals by order of August 25, 1975, denied the motion.

It is well established that appellate courts as well as trial courts may take judicial notice of adjudicative facts. Indeed, appellate courts may even take notice of matters not before the trial court. See, e.g., McCORMICK ON EVIDENCE, p. 773 (1972). Judicial notice by appellate courts has also embraced matters of public record, both Federal and State, 9 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE 306 (1971), and has expressly been applied to permit appellate consideration of public documents of federal administrative agencies. See, Fletcher v. Jones, 105 F.2d 58, 61 (D.C. Cir. 1939) (public documents of Home Loan Bank Board judicially noticed); Allis-Chalmers Mfg. Co. v. White Consolidated Industries, Inc., 414 F.2d 503, 523 (3rd Cir. 1969), cert. denied, 396 U.S. 1009(judicial notice of proceedings by the Federal Trade Commission); Colonial

Airlines v. Janas, 202 F.2d 914 (2d Cir. 1953) (judicial notice of Civil Aeronautics Board documents, despite the fact that the documents were not a formal part of the record on appeal); S.S. Kresge Co. v. Davies, 112 F.2d 708 (8th Cir. 1940) (judicial notice of stipulations made by a party on appeal with the Federal Trade Commission).

Assertations by defendants that the Court of Appeals erred in considering the HEW public documents is without merit, and indeed, is frivolous.[6/] The Court of Appeals decision to judicially notice these public documents was eminently reasonable and correct and in furtherance of the interests of justice.

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6. The contents of the documents of which defendants complain have always been "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned", Evidence Rule 201(b)(2), and defendants have had an "opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noted", Evidence Rule 201(e).

CONCLUSION

For the foregoing reasons, Respondents contend that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VILMA S. MARTINEZ
SANFORD JAY ROSEN
RICARDO DE ANDA
GEORGE KORBEL

Mexican American Legal Defense and Educational Fund

Counsel for Respondents.

November, 1975.